



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 13 OF 2013**

**SYOMITI MUSYOKA.....PLAINTIFF/APPLICANT**

**VERSUS**

**STEPHEN MUTINDA KAVINGO.....DEFENDANT/RESPONDENT**

**RULING**

1. In the Notice of Motion dated 19<sup>th</sup> February, 2019, the Plaintiff is seeking for the following orders:

***a. That the dismissal order dated 16<sup>th</sup> November, 2018 dismissing this case for want of prosecution be set aside.***

***b. That the suit be reinstated for hearing.***

***c. That the costs of this Application be provided for.***

2. The Application is premised on the grounds that the suit was dismissed for want of prosecution on 16<sup>th</sup> November, 2018; that neither the Applicant nor her counsel were served with the Notice to show cause why the suit should not be dismissed for want of prosecution and that the Applicant was condemned unheard.

3. In his Affidavit, the Plaintiff deponed that he came to know of the dismissal of the suit on 29<sup>th</sup> January, 2019 when his advocate attended court to file statement of issues and pre-trial questionnaire; that the original Plaintiff died in the cause of the proceedings and that this matter was dismissed for want of prosecution when he was in the process of preparing pre-trial documents.

4. The Application was not opposed by the Defendant. The Plaintiff's advocate relied on the Plaintiff's Affidavit.

5. The record shows that this suit was commenced by way of a Plaint on 3<sup>rd</sup> July, 2012. The Defendant filed his Defence on 3<sup>rd</sup> August, 2012. The last time the matter was slated for the hearing of an Application by the Plaintiff dated 2<sup>nd</sup> July, 2012 was on 23<sup>rd</sup> September, 2013. On the said date, the court directed that the status quo obtaining as at 17<sup>th</sup> July, 2013 to remain in force. The matter was slated for mention for directions on 23<sup>rd</sup> November, 2013.

6. It would appear that nothing happened on 23<sup>rd</sup> November, 2013. However, on 27<sup>th</sup> September, 2017, the Plaintiff's Application dated 5<sup>th</sup> June, 2017 for substitution of the original Plaintiff was allowed by the court.

7. When the matter came up for the dismissal of the suit for want of prosecution on 16<sup>th</sup> November, 2018, neither the Plaintiff's nor the Defendant's advocates were in court.

8. The Plaintiff has deponed that his advocate was never served with the Notice to show cause why the suit should not be dismissed. I have perused the Notice to show cause dated 3<sup>rd</sup> October, 2018. The notice was addressed to the Plaintiff's former advocates - M/S Martin M. Muithya and not the present advocates.

9. Indeed, the perusal of the Amended Plaint dated 14<sup>th</sup> December, 2017 and filed on 22<sup>nd</sup> December, 2017 shows the physical and postal address of the Plaintiff's current advocates. The court bailiff should have therefore served the current advocates for the Plaintiff with the Notice to show cause why the suit should not be dismissed for want of prosecution and not the former advocates.

10. The Plaintiff's advocates having not been served with the Notice to show cause why the suit should not be dismissed for want of prosecution, I find and hold that the Plaintiff was condemned unheard. The delay in prosecuting the suit must have been caused by the long process of substituting the deceased Plaintiff with the current Plaintiff, which substitution was done on 22<sup>nd</sup> December, 2017 when the Amended Plaint was filed. Indeed, from the time when the Amended Plaint was filed and when the suit was dismissed, a period of one (1) year had not lapsed.

11. For those reasons, I find the Plaintiff's Application dated 19<sup>th</sup> February, 2019 to be meritorious. The Application is allowed as prayed, save for the issue of costs, which shall be in the cause.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2019.

O.A. ANGOTE

JUDGE